SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1152 57

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW AND WILLIAM L. O'DONOVAN,
Petitioners,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent

MEMORANDUM FOR RESPONDENT

ELISHA HANSON,
729 Fifteenth Street, N. W.,
Washington 5, D. C.
FRANCES K. MARLATT,
11 West Prospect Avenue,
Mount Vernon, New York,
Attorneys for Respondent.

LETITIA ARMISTEAD,
729 Fifteenth Street, N. W.,
Washington 5, D. C.,
Of Counsel.

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MEMORANDUM FOR RESPONDENT

This memorandum will be devoted both to the Motion to Dispense with Reprinting Record on Certiorari and with the Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the Trial Term, Supreme Court, Westchester County, is reported at 180 Misc. 8, 41 N. Y. S. 2d 534 (R. 535-541).

The opinion of the Appellate Division of the Supreme Court for the Second Judicial Department is reported at 267 A. D. 284, 45 N. Y. S. 2d 479 (R. 551-561).

The decision of the Court of Appeals of New York affirming the Appellate Division's reversal of the Trial Term is reported at 293 N. Y. 781.

The order of the Court of Appeals amending the remittitur appears in the record at page 547. It has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on November 16, 1944. The remittitur of the Court of Appeals was amended on March 9, 1945. Between the entry of the judgment and the amendment of the remittitur petitioners obtained an order from Associate Justice Jackson of this Court extending their time to apply for a writ of certiorari sixty days from February 12, 1945. Petitioners filed their petition for a writ of certiorari on April 12, 1945, invoking the jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of the determination by the highest court of the State of New York that respondent was not engaged in interstate commerce and that petitioners were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Fair Labor Standards Act of 1938, this Court should review that decision.[1]

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[1] Respondent herein cannot agree with the jurisdictional statement of petitioners or with the statement of the federal question involved as elaborated by petitioners in their petition. The proceeding was originally instituted by petitioners, one of whom was City Editor and for a period of months acting Editor of respondent, another of whom was first Assistant Editor and later Sports Editor of respondent's newspaper and the other four of whom were reporters covering various local assignments. Petitioners started suit on September 14, 1942, or more than 18 months after respondent had gone out of business.

The record is undisputed that the sole purpose of respondent's newspaper was to serve the citizens of White Plains and the immediate adja-

STATUTE INVOLVED

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*). This statute is set forth in the Appendix at page 25.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 3 and the First and Fifth Amendments to the Constitution of the United States. Those provisions are set forth in the Appendix at page 22.

STATEMENT OF THE CASE

Petitioners started suit on September 14, 1942, in the Supreme Court of the State of New York, Westchester County, to recover overtime compensation claimed to be due under the provisions of the Fair Labor Standards Act of 1938. Respondent for many years prior to February 28, 1941, had been publisher of an evening newspaper, known as The White Plains Daily Reporter, published each weekday evening, except Sunday and certain specified holidays, throughout the year. The newspaper suspended publication on February 28, 1941.

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cent area in Westchester County, New York (R. 372). The record further shows that the circulation of respondent's newspaper during the period in controversy ranged from 9,500 to 11,000 copies a day; that at no time did it ever send on any one day more than 45 copies of its publication outside of the State of New York, these few copies going to residents of White Plains temporarily away on vacation or at school or in the armed forces (R. 64-66). The record is uncontradicted that respondent had no desire to sell its newspaper outside of the area consisting of White Plains and adjacent Westchester County (R. 372); it did not even attempt to cover the whole County or serve residents in Westchester County who were closer to other cities such as Yonkers, Mount Vernon and New Rochelle (R. 445).

In addition to the questions presented to this Court by petitioners, other questions were submitted to the Trial Court, to the Appellate Divi-

Following the filing of the complaint in the Trial Court respondent moved to dismiss under Rule 106 of the Rules of Civil Practice of New York on the ground that the complaint did not state facts sufficient to constitute a cause of action and also for an order dismissing the complaint under Rule 107 on the ground that the court had no jurisdiction over the subject matter of the action for the reasons that (a) the Act under which the claims were alleged to have arisen is not a statute which can be applied to the business of respondent by reason of the provisions of Article I, Section 8, Clause 3 (the commerce clause) and the First Amendment to the Constitution of the United States, and (b) the Act violates the rights of respondent as guaranteed by the Fifth Amendment to the Constitution of the United States. The motion was denied.

Subsequently all of the petitioners filed an amended complaint, answer to which was filed by respondent. When

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sion and to the Court of Appeals. Each of those questions was passed upon adversely to respondent herein in the Trial Court. The Appellate Division in its order reversing the Trial Court's judgment stated that in view of its determination that respondent was not engaged in interstate commerce and that petitioners were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Act, it was unnecessary to discuss the other questions raised. The Appellate Division, however, observed that the award made to each of petitioners by the Trial Judge was excessive in its method of computation of overtime compensation. It reversed the Trial Court on the law and the facts and dismissed the complaint on the law.

Among the other questions presented on appeal from the judgment of the Trial Court to the Appellate Division were:

(1) Whether Congress, in the light of the prohibition in the first Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of respondent.

(2) Whether Congress has the power under the commerce clause of the Constitution to apply the Act to respondent's newspaper publishing business.

(3) Whether, in view of the provisions of the First and Fifth Amendments, Congress has the power to regulate the business of the press by

petitioners rested during trial, respondent moved to dismiss for failure of proof which motion was denied. Petitioners moved to have the pleadings conformed to the proof and over objection this motion was granted. Respondent then renewed its motions on the statutory and constitutional grounds which were denied, and petitioners moved for judgment on the pleadings.

The Trial Court rendered judgment in favor of each of the petitioners for their claimed overtime compensation in a sum for each computed to include (a) the amount of claimed overtime at the rate of one and one-half times the regular rate at which each petitioner was employed, "regular rate" being construed by the Trial Court to be the employee's weekly salary divided by forty hours, *plus interest*, plus an additional equal amount as liquidated damages, and

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classifying the press on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to exempt more than 72 per cent of the total number of newspapers from the burdens of the Act, while subjecting all others engaged in the same business to those burdens.

(4) Whether petitioners sustained the burden of establishing the fact of overtime work and also the quantity of overtime work each week in the light of the record evidence that their claims bore every earmark of an afterthought manufactured for the occasion to which no credence should be given.

(5) Whether petitioners' method of computation conforms to the provisions of Section 7 of the Act as interpreted by this Court.

(6) Whether petitioners or any of them were professional employees and therefore exempt from the provisions of the Act.

The Court of Appeals of New York affirmed the order of the Appellate Division in toto. If this case is to be reviewed by this Court, respondent respectfully submits that all of the points presented below should be considered. *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 292 (1905); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567 (1931); *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920); *Dismuke* v. *United States*, 297 U. S. 167, 173 (1936).

(b) attorney's fees and costs. The total sum of the judgment for all petitioners was $42,110.34. [2]

FACTS ESTABLISHED BY THE RECORD

Nature of Appellants' Work and Basis of Their Claims for Overtime

Nature of Employment. Petitioners were paid weekly salaries, not hourly rates. The salaries of each varied during the period in controversy. None kept any regular account of his time when employed by respondent or was required to do so by respondent. Petitioners reported for work at various times during the day depending upon the nature of the work performed by each. They punched no time clock when they came in; they punched no time clock when the day was over; and they never reported any overtime to their employer or made any claim for overtime during the course of their employment or prior to the filing of the suit herein, more than eighteen months after the last of them was discharged and after respondent ceased publishing its newspaper.

It is undisputed that the work of each petitioner varied in character from day to day, from week to week; that they were never instructed how to do it or when to do it; that the coverage of assignments was left to the discretion of the men receiving them. Just as the work varied in character, so did the time consumed fluctuate from day to day and week to week.

How Petitioners Calculated Their Claimed Overtime

Each of the petitioners who appeared to prosecute his claim offered certain tabulations as to overtime alleged by him to have been worked while in the employ of respondent.

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[2] The judgment when reduced to dollars and cents cost imposed a burden of $1.12½ on each copy of respondent's newspaper sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy.

All of these tabulations were prepared after the institution of the suit and each of them in respect of the particular petitioner in behalf of whom it was offered differed from the claim advanced in the amended complaint. The method of preparation of these tabulations was disclosed during the course of the testimony. Petitioner Mabee who was the first witness testified that he had spent some 50 hours in the White Plains Public Library going over the files of the White Plains Reporter from October 24, 1938, until February 28, 1941, when it suspended publication (R. 54). From those files he made notes of the work which he did, estimated the hours which he spent on each of the assignments and then computed his claim of overtime. Mabee admitted on cross-examination that he kept no records and that he did not refer to the assignment book to check on his calculations. The concluding question and Mabee's answer thereto illustrate how his work was done, as follows:

> "Q. Where were any records kept such as you attempted to make here of the work of yourself and of the other employees?
>
> "A. Only in my head" (R. 106).

Even so, Mabee asserted that he could identify each and every job he had performed during the period in controversy by reference to the printed volumes of the White Plains Reporter (R. 80) and also that because of his familiarity with the assignments of the other petitioners herein he could identify their work.

Cross-examination of other petitioners developed that Mabee had also prepared tabulations of their claimed overtime for them which they in turn checked mainly from memory. Petitioner Barnum, for instance, testified that he took Mabee's word as to many of the assignments which he claimed to have covered and for which he claimed overtime compensation (R. 196) and that he didn't even bother to check Mabee's calculations against the printed volumes

of the White Plains Reporter kept in the Public Library. He merely checked many of Mabee's listings from his head (R. 198).

Barnum offered a tabulation of his overtime hours, which was admitted in evidence. Later, after it developed he was on vacation at a time the tabulation showed six overtime assignments, he took the stand and corrected it by deleting those six assignments and substituting four additional ones after he returned (Petitioner's Ex. 7 and 14).

Petitioner Mockridge kept clippings of byline stories which he wrote (R. 111), but depended upon Mabee to prepare a list of his other work (R. 139). Mockridge himself originally claimed to have covered a G. O. P. rally in White Plains but when Mabee informed him that some one else had written that story he struck it from his tabulation (R. 139). No one of the petitioners even attempted to claim that his tabulation was accurate in any sense of the word. Each asserted that it was a minimum calculation, not a maximum and not an accurate calculation.

On Mabee's tabulation of overtime claims were two claims for time spent while he was playing golf with the editor of the newspaper (R. 88-89). Three of the original petitioners worked on the sports desk and the testimony developed the fact that all three of them would go to such events as boxing matches, wrestling matches and hockey games where one would write the story, yet all claimed overtime. Petitioner O'Donovan was active in civic and in National Guard work (but resigned his commission just before the Guard was called into active service), yet he claimed overtime when he went to military functions, when he presided as toastmaster at various dinners and banquets in connection with his civic and military activities (R. 305-306) and asserted that he would not have participated in any such activities except for his connection with the

respondent's newspaper (R. 302). O'Donovan was responsible for his own assignments, if such they can be called, and respondent never heard anything about many of them until he presented his claim for overtime at the trial.

Five of the six petitioners calculated their overtime on an even hour basis. The sixth calculated his on a half hour basis. The record demonstrates that newspaper reporting cannot be calculated on either basis.

As the record stands today no one, not even the petitioners themselves, can tell how much overtime, if any, they worked.

The same is true as to money damages claimed. The amounts testified to by the different petitioners differed from the amounts claimed by them in their complaint. None of these amounts is based on the payroll week itself.

There was no evidence before the trial court in the nature of a payroll week tabulation which applies a true hourly rate against the actual number of hours worked in any such week even though the trial judge specifically requested counsel for petitioners to prepare and present such tabulations. All that counsel did was this: He fixed the hourly rate by dividing the weekly wage by 40 and he fixed the overtime rate at one and one-half times that result. Then he took each of the petitioners' claims of "minimum overtime" and multiplied it by the overtime rate which he in turn had fixed by the above described method.[3]

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[3] This Court, in a case wherein it held the law to apply, held that the "regular rate" at which one is employed, made by Section 7 of the Federal Fair Labor Standards Act of 1938 the basis upon which his overtime is to be computed is, in the case of one working for a varying number of hours per week for a fixed weekly wage, the quotient obtained by dividing the weekly wage by the number of hours worked each week even though such quotient may vary from week to week with the number of hours worked. Wages divided by hours equal regular rate. Time and one-half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours. *Overnight Motor Transportation Company, Inc.* v. *William H. Missel,* 316 U. S. 572, 580 (1942).

As to the Nature of Petitioners' Work

O'Donovan. The petitioner O'Donovan was City Editor of the White Plains Reporter (R. 287). As such he had charge under the direction of the Editor of getting out the news pages of that newspaper each day (R. 315). In addition, during a long period when the Editor was away on account of illness, he was in complete charge of all of the editorial content of the newspaper including the editorial pages as well as the news pages (R. 314). He made recommendations on hiring and firing (R. 313-314) and on the increasing or decreasing of salaries. He carried out the policies of his employers and owned a small amount of stock in respondent company (R. 306).

Mabee. The petitioner Mabee during the greater portion of his time in controversy with respondent was the Assistant City Editor of the newspaper. As such he gave assignments to reporters, handled many details for the executives including the disposition of complaints and the transaction of other matters of business (R. 44-46, 67-68). He directed the work of others at all times even when he ceased being Assistant City Editor and became Sports Editor in which position he had an assistant whose work he supervised and to whom he gave assignments.

Petitioners Barnum, Tompkins, Mockridge and Trow. Petitioners Barnum, Tompkins, Mockridge and Trow were reporters. All of them were engaged solely in local activities, that is, in gathering news of various events that occurred in and about White Plains and adjacent Westchester County, writing such news and turning it in for publication to the newspaper.

As to Respondent's Business

The record shows that for a time during the period in controversy respondent obtained reports of the Associated Press, a national news gathering organization. It is un-

disputed that very little either of AP or International News Service reports was used by respondent in the publication of its newspaper (R. 74). Respondent concentrated on local news.

Respondent purchased certain of its supplies from outside of the State of New York, such as all of its newsprint paper and its ink (R. 48). It also obtained certain news features from sources outside of the State of New York (R. 49).

The record is undisputed that in the publication of a daily newspaper no news stories or feautres are disseminated to readers exactly as they reach the office. All news stories are first read and then selected or discarded. Most of those which came from the Associated Press and the International News Service as well as many of the features were discarded. Those that were selected were edited to suit the needs of the paper. Heads and subheads were written. Then they went to the composing room where they were set in type. After the type was set it was placed in what is known as the page form and when the entire page form was completed a mat was made of the form, a cylinder was cast from this mat, after which the cylinder then went on the press (R. 72).

In the case of pictures one additional process was needed before they reached the press. After selection they first went to the stereotype room where a flat cast was made of them for insertion on the page form. This process was a substitute in respect of pictures for the process of setting written copy in type (R. 72-73). Legends for pictures were set in type and handled as other written copy.

After the round cylinder was placed on the press the ink was applied, the press was started and the newspaper came off the press.

It is also undisputed in the record that a small percentage of the advertising published by respondent was what is

known as national or general advertising, that is, advertising that came from outside of White Plains from agencies engaged in placing such advertising with newspapers throughout the country. By far the greater volume of advertising was local advertising originating in White Plains and its immediate vicinity. This consisted principally of what is known as local display advertising, classified advertising and legal advertising.

The record shows that there was no actual or practical continuity of materials from outside the state to respondent's readers within the State of New York. There was a definite "break" or termination of the interstate movement of the materials. After they reached respondent's office they were processed by independent acts of a purely local nature.

Appellate Division's Reversal

Respondent appealed from the judgment of the Trial Court to the Appellate Division, Second Department of the Supreme Court of the State of New York which unanimously reversed the Trial Court. In its appeal respondent presented all of the issues hereinbefore referred to but the Appellate Division in its opinion stated:

> "In view of our determination that appellant (respondent here) was not engaged in interstate commerce and that respondents (petitioner here) were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Act, it is unnecessary to discuss the other questions raised."

Petitioners appealed from the order of the Appellate Division to the Court of Appeals of New York. All of the issues were presented to the Court of Appeals which unanimously affirmed the Appellate Division's order of reversal. Later, on motion of petitioners, the Court of Ap-

peals amended its remittitur by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938."

Just prior to the expiration of time for filing a petition for a writ of certiorari in this Court, petitioners obtained an extension of time for such filing from Associate Justice Jackson until April 12, 1945. On April 12, 1945, a petition for a writ of certiorari was filed and attached to it was a Motion to Dispense with Reprinting Record on Certiorari.

AS TO THE MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD

It is difficult for this respondent to determine under what rule of the Court petitioners believe the Court should act to dispense with the printing of the record. None of the petitioners is a pauper. According to information and belief petitioner William L. O'Donovan is now employed by the Celanese Corporation of America with offices both in New York City and Washington, D. C. For many years O'Donovan had been active in National Guard work in New York and had risen to the position of Captain-Adjutant of the regiment. He resigned from the Guard just before it was called into active service. He gave as his reason that he resigned because "I had a wife and children to support so I went out and got it (a job), but I could not take a new job and then ask for time off to go to camp within a few months, so I had to sever my connections" (R. 307). O'Donovan further testified that had he remained in the Guard his salary and allowances as a Captain would have been about $320 a month. Presumably his present income is larger than that.

Tompkins, another petitioner, according to information and belief is now employed by a national advertising agency with offices in Dayton, Ohio.

Trow, another of the petitioners, is now employed on the New York World-Telegram in New York.

Barnum, still another petitioner, is employed by the Journal of Commerce in New York.

Petitioners Mockridge and Mabee are in the armed services.

The fact that respondent herein would not stipulate to a reduction of the record consisting of more than 500 pages to a record of approximately 100 pages is no reason for the granting of the motion. Respondent was entirely within

its rights under the rules of this Court in refusing to stipulate the elimination from the record of testimony and exhibits it regards as pertinent to the issues in the case.

It would seem unnecessary in this memorandum to discuss the differing points of view of petitioners and respondent as to this Court's duty in the premises. Respondent has no objection whatsoever to the granting of the motion to dispense with the printing of the record if that motion is consonant with the Court's procedure under its rules. Respondent does feel obligated, however, to call to the attention of the Court the fact that petitioners are not paupers and further to the fact that under the rules respondent is not obligated to waive any of its rights insofar as the presentation of the whole record is concerned merely at the demand of petitioners.

REASONS FOR DENIAL OF THE WRIT

1. The Court of Appeals of New York in affirming the Appellate Division's order was correct in holding that petitioners and respondent were not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

The fact that respondent received news, feature articles and materials from out of the state did not, as contended by petitioners, bring respondent within the coverage of the Act. This Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943), at page 571, stated that "* * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572 (1943), this Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical

continuity of movement of materials from without the state to customers within the state.

As pointed out by the Appellate Division, the United States Circuit Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (certiorari denied January 17, 1944, 321 U. S. 763, rehearing denied May 22, 1944, 322 U. S. 770) rejected the "identical argument, under similar facts" offered by petitioners in the Appellate Division. This case is in point because it recognized that a newspaper publisher does not merely pass on to his readers the materials he has received but sells them an entirely new article composed of these materials. As the Fourth Circuit Court said:

> "* * * there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at page 114.)

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

As the Appellate Division stated, "The conclusion is irresistible that appellant (respondent here) was engaged in a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper."

Thus, respondent's business falls within the category of local business which Congress left to the protection of the states. *Walling* v. *Jacksonville Paper Co., supra.*

The Appellate Division held that the mailing of less than one-half of one per cent of respondent's total circulation to subscribers temporarily outside of the state did not change its business from an intrastate to an interstate enterprise. The Court of Appeals affirmed this holding. This interstate circulation comes within the *de minimis* doctrine.

This holding is in harmony with decisions of this Court for this Court in *NLRB* v. *Fainblatt,* 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the doctrine of *de minimis.* Since, as this Court has pointed out in *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (1942) and *Walling* v. *Jacksonville Paper Co., supra,* the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that the courts in construing the Fair Labor Standards Act should apply the *de minimis* doctrine to certain cases.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small portion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg* v. *Worman,* 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff* v. *Henry Gramling & Co.,* 42 F. Supp. 754 (E. D. Arkansas, August 22, 1941); *Zehring* v. *Brown Materials,* 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron* v. *Goodyear Tire & Rubber Co.,* 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al.* v. *Horton's Laundry,* 56 F. Supp. 901 (N. D. Georgia, January 18, 1944). The Appellate Division and the Court of Appeals followed this line of cases.

Petitioners, however, contend that the appellate courts erred in following this line of cases and should have followed certain cases which they list as controlling. It is submitted that *Gerdert* v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964 (S. D. Florida, April 29, 1941), cited by petitioners, is not authority for the proposition that the *de minimis* doctrine is not applicable to cases arising under the Fair Labor Standards Act. Nor is *Dorner* v. *Iaco Clothes, Inc.*, 7 Wage and Hour Reporter 35 (N. D. Illinois, December 24, 1943) controlling here for in that case the court recognized that there would be many cases arising under the Act in which the doctrine would be applied but stated that it could not be applied there where a "substantial part" of the employer's products flowed in interstate commerce. Likewise, it was not applicable in *Walling* v. *Partee et al.*, 6 Wage and Hour Reporter 863 (M.D. Tennessee, May 26, 1943) where 15.16 per cent of the company's products went out of state nor in *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tennessee, May 3, 1940), where a substantial part (over 20 per cent) of the products of the company and its parent company were destined for interstate commerce.

Furthermore, the opinion of the Appellate Division shows that it was cognizant of the line of cases cited by petitioners in which the courts have refused to apply the *de minimis* doctrine because the interstate business, although small in amount, was regular and an integral part of the business. It analyzed these cases and pointed out the essential difference between these cases and the present one. It held, and the Court of Appeals affirmed, that they were not applicable here and that the present case would come within the *de minimis* doctrine because the out of state circulation was not an essential part but only an incidental part of the service respondent rendered its local subscribers.

Here, as the Appellate Division found, respondent "had no desire and made no effort to secure 'out of state' circulation, although during the summer its newspaper was mailed to subscribers who were temporarily out of the State on vacation or absent from the State while at school or in the armed forces." It correctly held that this interstate business was "not regular but casual; not an integral but only an incidental part of its essentially local service." Certainly this out of state circulation did not bring respondent within the coverage of an Act designed to suppress nationwide competition in interstate commerce for respondent was in no sense competing interstate with other newspapers.

2. *The question presented by this petition is not an open one as yet undecided by this Court.*

There is nothing whatsoever in the record to sustain the statement that the New York courts in their decisions on the commerce question in this case "considered the question an open one in this Court and one that should be decided by this Court", as was stated in petitioner's Jurisdictional Statement at page 7. Nor did the Appellate Division state that it was deciding questions arising under the Act not yet decided by this Court as petitioners would have it appear from the quotation set forth on page 15. The Appellate Division actually said that there had been presented to it the questions whether the Act could constitutionally be applied to the newspaper publishing business because of the guaranties contained in the First and Fifth Amendments, that these precise questions had not been decided by this Court, and that it was not necessary for it to pass upon these questions. It unanimously found that under applicable decisions of this Court and other federal courts the respondent was not engaged in commerce and peti-

tioners were not engaged in producing goods for commerce.

The Court of Appeals unanimously affirmed the Appellate Division. When petitioners sought rehearing before the Court of Appeals their motion therefor was denied. All that the Court of Appeals did was to amend its remittitur in accordance with petitioners' request to state that there had been presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act and that the Court of Appeals had held that respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

3. *Review if Granted Should be all Embracing.*

The constitutional issues were decided adversely to respondent by the motions judge and the trial judge. Neither the Appellate Division nor the Court of Appeals considered it necessary to pass upon those issues in view of the fact that both of them unanimously held that respondent was not engaged in commerce or in producing goods for commerce and that petitioners were not engaged in any occupation or process necessary to the production of goods for commerce. Respondent preserved these issues in its appeal to the Appellate Division and in the proceedings before the Court of Appeals. If review be granted, it should be all embracing.

Likewise, respondent in its appeal to the Appellate Division attacked the findings of the trial court on the ground that no credence should be given to evidence manufactured as was the evidence of petitioners in this case, and further on the ground that the judgment itself was contrary to the decisions of this Court in cases affecting recoveries under

the Act where the Act was held applicable. Just as in the case of the constitutional questions presented, the Appellate Division and the Court of Appeals found it unnecessary to pass upon these questions in order to reach their decisions reversing the trial court. The Appellate Division, however, did observe that the award to each respondent was excessive insofar as it computed overtime compensation on a regular workweek of 40 hours rather than 44 hours during the first year's operation of the Act and 42 hours during the second year's operation of the Act. The trial judge also granted interest which this Court has said is not allowable.

To insist upon an all-embracing review, if the petition be granted, is not to concede that the controversy should be reviewed. The judgment of the Court of Appeals of the State of New York was properly entered on the question of commerce. Only in the event this Court thinks that judgment should be reviewed is request made that all issues should be reviewed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ELISHA HANSON,
729 Fifteenth Street, N. W.,
Washington 5, D. C.;
FRANCES K. MARLATT,
11 West Prospect Avenue,
Mount Vernon, New York,
Attorneys for Respondent.

LETITIA ARMISTEAD,
729 Fifteenth Street, N. W.,
Washington 5, D. C.,
Of Counsel.

APPENDIX

Constitutional Provisions Involved

The constitutional provisions involved are Article I, Section 8 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States.

Article I, Section 8 of the Constitution of the United States provides that:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[PUBLIC—No. 718—75TH CONGRESS]
[CHAPTER 676—3D SESSION]
[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages tobe paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner: The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.